

HARKINS CUNNINGHAM LLP

Attorneys at Law

dhirsh@harkinscunningham.com
Direct Dial: (202) 973-7606

1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
Telephone 202.973.7600
Facsimile 202.973.7610

231762

January 26, 2012

BY E-FILING

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

ENTERED
Office of Proceedings

JAN 26 2012

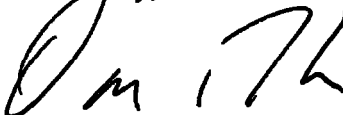
Part of
Public Record

Re: *In re National Railroad Passenger Corporation: Section 213*
Investigation of Substandard Performance on Canadian National
Railway Company Rail Lines (STB Docket No. NOR 42134)

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find CN's Request For
Extension Of Time To Respond To Amtrak.

Yours truly,



David A. Hirsh

Counsel for Canadian National Railway Company,
Grand Trunk Western Railroad Company, and
Illinois Central Railroad Company

Enclosure

cc: David W. Ogden

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42134

**IN RE NATIONAL RAILROAD
PASSENGER CORPORATION:
SECTION 213 INVESTIGATION OF
SUBSTANDARD PERFORMANCE ON
CN RAIL LINES**

CN'S REQUEST FOR EXTENSION OF TIME TO RESPOND TO AMTRAK

Sean Finn
Olivier Chouc
CN
P.O. Box 8100
Montréal, QC H3B 2M9
(514) 399-6500

Paul A. Cunningham
David A. Hirsh
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3608
(202) 347-7840

*Counsel for Canadian National Railway Company,
Grand Trunk Western Railroad Company, and Illinois Central Railroad Company*

January 26, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42134

**IN RE NATIONAL RAILROAD
PASSENGER CORPORATION:
SECTION 213 INVESTIGATION OF
SUBSTANDARD PERFORMANCE ON
CN RAIL LINES**

CN'S REQUEST FOR EXTENSION OF TIME TO RESPOND TO AMTRAK

On January 19, 2012, National Railroad Passenger Corporation ("Amtrak") filed a "petition" seeking to invoke the Board's authority pursuant to Section 213 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA") (codified at 49 U.S.C. § 24308(f)) to initiate and conduct an investigation. Amtrak seeks an investigation of its allegations concerning failures to meet the metrics established under Section 207 of PRIIA for on-time performance and delays for its trains operating over the rail lines of Grand Trunk Western Railroad Company and Illinois Central Railroad Company, two indirectly owned U.S. operating subsidiaries of Canadian National Railway Company (the three, collectively, "CN"). Although Amtrak styled its pleading as a "petition," a complaint is required to invoke the Board's investigation authority under Section 213 of PRIIA. Accordingly, without waiving any arguments, CN will hereinafter refer to Amtrak's filing as the "Complaint."

Answers to complaints are due within 20 days of service, in this case by February 8, 2012. *See* 49 C.F.R. § 1111.4(c). For the reasons set forth below, CN hereby respectfully requests, pursuant to 49 C.F.R. § 1104.7(b), a 30-day extension of that due date to March 9,

2012. Counsel for CN have discussed this motion with counsel for Amtrak, and are authorized to report that Amtrak consents to the requested extension.

The Complaint includes 119 paragraphs, nine graphs purportedly drawn from PRIIA performance data, numerous factual allegations, and a host of legal and other characterizations. The basis and underlying facts of many of its assertions (including its comparisons of “averages” drawn from PRIIA data to CN-related PRIIA data) is not apparent on the face of the Complaint, and Amtrak has not produced workpapers underlying the Complaint. (CN is today writing to Amtrak’s counsel requesting Amtrak’s workpapers.) Even with those workpapers, CN would require substantial time to investigate and respond to Amtrak’s many allegations. The requested extension of time is essential to give CN a reasonable and fair opportunity to respond.

The Complaint presents many novel legal and procedural issues. It is the first complaint ever brought seeking initiation of a Board investigation of alleged causes of Amtrak’s failure to meet minimum PRIIA metrics. It raises important questions about the responsibilities of freight railroads and Amtrak for their own operations as well as for coordination and cooperation with respect to issues such as scheduling conflicts, congestion, and investments in infrastructure. Moreover, the PRIIA metrics themselves are the subject of a separate constitutional challenge pending in U.S. District Court, in which briefing on cross motions for summary judgment is scheduled to be completed on March 6, 2012. *See AAR v. DOT*, No. 1:11-cv-01499 (D.D.C. filed Aug. 19, 2011).

The Board will also face for the first time a panoply of serious issues related to the import and reliability of the PRIIA data. These include longstanding freight rail industry concerns about the source (reports by Amtrak’s own conductors) and basis for the delay data, Amtrak’s categorization of delays and assignment of responsibility, and the adequacy of the process for

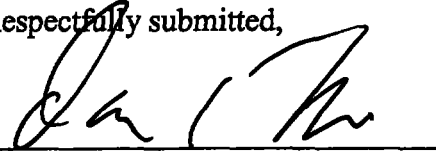
reviewing and correcting data errors. These and like issues would be integral to the investigation sought by the Complaint. *See* 49 U.S.C. § 24308(f)(1) (“the Board has authority to review the accuracy of the train performance data . . .”).

The Complaint also raises many other important legal issues of first impression under PRIIA, including the meaning of the term “preference” under 49 U.S.C. § 24308(c), the meaning of the standard for relief from “preference” obligations under that subsection (“materially . . . lessen the quality of freight transportation”) and its role in any investigation, and the relationship between CN and other freight railroads’ operating contracts with Amtrak and the PRIIA metrics and requested investigation. Consequently, the Board’s response to Amtrak’s Complaint will likely have great practical and precedential importance for the entire railroad industry and those who rely on it, including Amtrak, freight railroads, commuter rail service providers, rail passengers, and freight rail customers.

The Board will also need to consider what procedures should govern PRIIA investigations in general, and what, if any, specific procedures should be used to address the novel, important, and potentially precedent-setting issues presented by the Complaint. CN would like to assist the Board’s consideration of the appropriate schedule, evidentiary requirements, and other procedures to deal with these novel issues by providing, as part of its initial response, suggestions as to how the Board may wish to conduct this proceeding. The requested extension is required to provide CN with reasonable time to consider and appropriately address all of the matters and issues outlined above. No party would be prejudiced by the requested extension. (As noted above, Amtrak has consented to the extension.)

For the foregoing reasons, good cause exists to grant CN's unopposed request to extend the time to respond by 30 days to March 9, 2012. Expedited action is requested here because under the Board's rules CN's response is currently due in 13 days.

Respectfully submitted,



Paul A. Cunningham
David A. Hirsh
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

Sean Finn
Olivier Chouc
CN
P.O. Box 8100
Montréal, QC H3B 2M9
(514) 399-6500

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3608
(202) 347-7840

*Counsel for Canadian National Railway Company,
Grand Trunk Western Railroad Company, and Illinois Central Railroad Company*

January 26, 2012

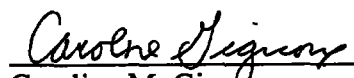
CERTIFICATE OF SERVICE

I certify that I have this 26th day of January, 2012, caused a true copy of the foregoing

Request For Extension Of Time To Respond To Amtrak to be served by e-mail upon:

Eleanor D. Acheson
William Herrmann
Christine Lanzon
National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4285

David W. Ogden
Jonathan E. Paikin
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006-3642


Caroline M. Gignoux